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HAROLD B. WILLEY,

No. 338

In the Supreme Court of the United States

OCTOBER TERM, 1955

HOLMBY PRODUCTIONS, INC., and UNITED ARTISTS CORPORATION, *Appellants*,

vs.

MRS. FRANCES VAUGHN, MRS. J. R. STOWERS and MRS. BERTHA HALL, Constituting the Kansas State Board of Review, HAROLD R. FATZER, Attorney General of the State of Kansas, and DONALD E. MARTIN, County Attorney of Wyandotte County, Kansas, *Appellees.*

On Appeal from the Supreme Court of the State of Kansas

MOTION TO DISMISS OR AFFIRM

HAROLD R. FATZER,
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PAUL E. WILSON,
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DONALD E. MARTIN,
County Attorney of Wyandotte County, Kansas,
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Appellees in the above entitled case move to dismiss or affirm on the grounds that the order from which the appeal is taken is not a final order and for the further reason that the questions presented are so unsubstantial as not to need further argument.

THE ORDER IS NOT FINAL

Section 1257 of Title 28 U. S. C. authorizes review in this Court of

> "*Final* judgment or decree rendered by the highest court of any state in which a decision could be had . . ." (emphasis supplied.)

Rule No. 16 of the Rules of the Supreme Court of the State provides in part:

> "Motion for a rehearing or for a modification of the judgment . . . may be filed within 20 days after the decision. . . ."

The record in *Holmby Productions, Inc., et al. v. Vaughn, et al.*, 177 Kan. 728, 282 P. 2d 412, does not reveal that motion for rehearing or other post-decision motion was filed by the appellants herein. Appellees respectfully suggest that the order appealed from is not final for the reason that appellants have failed to avail themselves of all remedies and procedures to which they were entitled under the rules of the Supreme Court of the State of Kansas. Hence, appellees urge the dismissal of said case.

THE QUESTIONS ARE NOT SUBSTANTIAL

A. The Alleged Deficiency in Standards has been Remedied by Regulation

The appellants allege that the statutory standards for censorship contained in the Kansas Motion Picture Censorship Law as applied by the Kansas State Board of Review and affirmed by the Supreme Court of Kansas in the instant case are by that application given a construction so broad, vague and indefinite as to render such standards and each of them invalid as violative of constitutional guarantees. Assuming *arguendo* that the contention made by appellants is sound with respect to the instant case, appellees respectfully submit that any lack of definiteness in the statutory standards has been remedied by regulations adopted by the Kansas State Board of Review since the inception of this litigation.

Section 74-2208 of the General Statutes of Kansas, 1949 provides:

> "The board may make and adopt such reasonable rules and regulations as it may deem necessary, not inconsistent with the laws of the state, for enforcing the provisions of this act."

Pursuant to the foregoing authority the board has adopted regulations limiting and defining the statutory standards of

censorship. These regulations, effective on March 15, 1954, are as follows:

"18-1-22. Within the meaning of G. S. 1949, 51-102, a film or reel shall be deemed cruel, obscene, indecent or immoral when:

"(*a*) Said film or reel expressly or impliedly presents as desirable, acceptable or proper patterns of behavior, acts relating to sex which constitute felonies or misdemeanors under the laws of this state.

"(*b*) Either the theme or its manner of presentation, or both, present sex relations as desirable, acceptable or proper pattern of behavior between persons not married to each other.

"(*c*) It portrays explicitly or in detail an act of adultery, fornication, rape or seduction.

"(*d*) It portrays nudity or a simulation thereof, partial nudity which is sexually immoral, sexual relations of any kind, or actual human birth, or if it presents scenes portraying sexual hygiene, sex organs, abortion, methods of contraception or venereal disease. (Authorized by G. S. 1949, 74-2208; Effective March 15, 1954.)

"18-1-23. Within the meaning of G. S. 1949, 51-103, a film or reel shall be deemed such as tends to debase or corrupt morals when:

"(*a*) The theme or manner of its presentation is of such character as to present the commission of criminal acts or contempt for law as constituting profitable, desirable, acceptable, respectable or commonly accepted behavior; or

"(*b*) If it advocates or teaches the use of, or the

methods of use of, narcotics or habit forming drugs. (Authorized by G. S. 1949, 74-2208; Effective March 15, 1954.)"

In view of this action of the Board of Review, in defining and limiting the statutory standards for censorship, the instant case, when "put into proper focus," assumes only isolated significance, and does not merit review in this Court (Rice v. Sioux City Memorial Park, Inc., et al., _____ U. S. _____, 75 S. Ct. 614.

765; *U. S. v. Harmon*, 45 Fed. 414; *U. S. v. Two Obscene Books*, 99 Fed. Supp. 760.)

The decisions of this Court suggest the propriety of censorship on the basis of obscenity.

In *Chaplinsky v. New Hampshire*, 315 U. S. 568, 571, 572, 86 L. Ed. 1031, 1034, 1035, 62 S. Ct. 766, where the Court unanimously declared:

> "That in certain well defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous and the insulting or fighting words . . ."

And in *Near v. Minnesota,* 283 U. S. 697, 716, 75 L. Ed. 1357, 1367, 51 S. Ct. 625, the Court affirmed that "the primary requirements of decency may be enforced against obscene publications." No question concerning the soundness of the rule is raised in *Burstyn v. Wilson,* 345 U. S. 495, 96 L. Ed. 1098, 72 S. Ct. 777. There the Court comments specifically:

> "Since the term 'sacrilegious' is the sole standard under attack here, it is not necessary for us to decide, for example, whether a state may censor motion pictures under a clearly drawn statute designed and applied to prevent a showing of obscene films."

We infer that the Court has specifically excluded the standard "obscene" from the rule applied in the Burstyn case. We also note that in *American Civil Liberties Union, et al., v. City of Chicago, et al.,* 3 Ill. 2d 334, 121 N. E. 2d 585, a case upon which the appellants rely extensively, the Court found:

> "The term 'obscene' has achieved a sufficiently precise meaning to describe a class of motion pictures which the state may validly suppress." (Syl. 5.)

Hence we perceive no valid argument that the term "obscene" lacks definiteness and meaning.

Moreover, the record reflects that this concept entertained is by the Kansas Board of Review a certain one. In

the trial court plaintiffs there and appellants here, called the Chairman of the Board of Review as their witness. Upon interrogation as to the Board's understanding of the term "obscene" the following definition was given:

> "Any thing would be obscene that would advocate lewdity between the sexes, between men and women, especially in the sex line and would tend to show, especially young people, that such an attitude was the correct and accepted method, code of life, as this picture would in our opinion." (T. 34.)

C. The Constitutionality of the Statute here under Attack is *Res Adjudicata*

The Kansas statute providing a system of motion picture censorship was subjected to attack on constitutional grounds similar to those involved in the case of *Mutual Film Corporation v. Hodges*, 236 U. S. 248, 59 L. Ed. 561. The form of the statute then was substantially identical with the present statute. In the Mutual Film case, and a companion case from Ohio (*Mutual Film Corp. v. Industrial Commission of Ohio*, 236 U. S. 230, 59 L. Ed. 552), the statute was specifically approved by this Court. While it is conceded that the Burstyn case has modified substantially the opinion in the Mutual Film cases, there is nothing in the majority opinion in the Burstyn case which would suggest that the Court now entertains a notion that a system of pre-

censorship is *per se* unconstitutional. Indeed the contrary appears to be the case. The Court comments:

> "It does not follow that the Constitution requires absolute freedom to exhibit every motion picture of every kind at all times and all places. That much is evident from the series of decisions of this Court with respect to other media of communication of ideas. Nor does it follow that motion pictures are necessarily subject to the precise rule governing any other particular method of expression. Each method tends to present its own peculiar problem." (Pp. 504-505.)

And further

> ". . . it is not necessary for us to decide . . . whether a state may censor motion pictures under a clearly drawn statute . . ."

Inasmuch as the Mutual Film cases have established this Court's approval of the Kansas statute, and in view of the fact that in the Burstyn case, this Court specifically declined to condemn precensorship of motion pictures, we suggest that the statute here under attack has the specific sanction of the precedents of this Court.

D. The Judicial Review Afforded by the Kansas Statute is Adequate

Section 51-107 of the General Statutes of Kansas provides in part:

> "The office of the board provided for in this act shall be in Kansas City, Kansas, and any person, company or corporation aggrieved by the action thereof, may have redress in the district court of Wyandotte county in this state, in which service may be had upon the board or any membr thereof by commencing proceedings therein within sixty days from the action of the board complained of by such person, company or corporation: . . ."

Consistent with the classic concept of judicial review, the Kansas Courts have determined that judicial inquiry should go only to the question of whether the action of the Board was arbitrary and capricious, and that the Court will not substitute its discretion for that of the Board with respect to the merit of the film under consideration. Such review has been determined to afford due process of law. (*Midwest Photoplay Corporation v. Board of Review*, 102 Kan. 356, 169 P. 1154.) That the conclusion of the Kansas Court is supported by the precedents of other courts is too well known to require further citation.

Appellants rely upon the decision of the Illinois Supreme Court in the case of *American Civil Liberties Union v. City of Chicago*, 3 Ill. 2d 334, 121 N. E. 2d 585. We submit that the rule there is inconsistent with the preponderance of authority. Hence, we make no effort to reconcile the Illinois case with the position of the Kansas Court. We

simply elect to stand with the overwhelming weight of authority that the review afforded by the Kansas statute as interpreted by the Supreme Court meets all of the requirements of due process.

CONCLUSION

For the reasons hereinbefore set forth, appellees respectfully urge that the within case should be dismissed or affirmed.

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